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Supreme Court, U.S.
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No. 04-883

In The Supreme Court of the United States

GARY McDOWELL and
ROSELEA McDOWELL,

Petitioners,

v.

PROVIDENCE HEALTH CARE PLAN,
an Oregon non-profit corporation,

Respondent.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN REPLY

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BRIEF IN REPLY

Petitioners McDowell submit this brief in reply to address new matter in the brief in opposition submitted by respondent Providence Health Plan in Supreme Court Case No. 04-883. This Court should grant petitioner McDowells' petition for writ of *certiorari*, and deny cross-petitioner Providence Health Plan's conditional cross-petition.

REPLY TO PROVIDENCE'S COUNTER-STATEMENT OF THE CASE (AND SUMMARY OF FACTS)

Respondent Providence asserts at page three that these consolidated cases "involve respondent's attempts to enforce its undisputable contractual right to reimbursement" under its health care services contract. Respondent Providence avoids characterizing its contract as an ERISA plan, but that is exactly what the health care services contract is. The health care services contract upon which respondent Providence relies (the actual document is named a "Master Group Contract") defines itself as a "plan." Master Group Contract, Exhibit 2 to Complaint in **McDowell I**, USDC Case No. 01-1704, CR:1, p. 7, paragraph 1.41, p. 54, paragraph 15.22.[1] Respondent alleged in its complaint in **McDowell II**, USDC Case No. 02-6110,

[1] Pages 7 and 54 of the document (Master Group Contract) are pages 12 and 59 of the Exhibit 2, respectively. The McDowells will cite plan provisions by citing the document pages, not the exhibit pages. The document pages are in the lower right-hand corner.

p. 2, paragraph 5, App:H-2, that the health care services contract was an ERISA plan.[2]

In any event, petitioners McDowell never signed the health care services contract, never signed an application requesting coverage from respondent Providence, never signed an enrollment form with respondent Providence, never signed the Master Group Contract, and never agreed to the terms of respondent Providence's plan, and particularly the reimbursement provision relied upon by respondent.[3] Mr. McDowell obtained health care coverage through his employer. After SelectCare provided coverage through 1999, respondent unilaterally issued in 2000 its own form of plan with the reimbursement provision and provided coverage for Mr. McDowell and his co-workers for one year, after which Mr. McDowell's employer terminated respondent Providence. Affidavit of Gary McDowell, p. 2, in **McDowell II**, USDC Case No. 02-6110, CR:16.

Respondent Providence asserts at page four that the McDowells signed, and the undersigned counsel accepted, a "trust agreement," agreeing to reimburse respondent for medical expenses paid. The fact is that respondent Providence was obligated under its plan to pay the McDowells' medical expenses. See, Master Group Contract, Exhibit 2 to Complaint in **McDowell I**, USDC Case No. 01-1704, CR:1, pp. 23-39. But, contrary to respondent Providence's

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[2] Indeed respondent's name, **Providence Health Care Plan**, suggests that its contractual commitments are covered by ERISA.

[3] In respondent's brief in opposition, page four, respondent contends that the McDowells applied for health coverage with respondent's "predecessor-in-interest by merger," SelectCare Health Plans. There is no evidence in the trial court record (other than counsel for respondent's assertion) that SelectCare Health Plans was respondent's predecessor-in-interest by merger.

obligation under the plan to pay the McDowells' medical expenses, it refused to pay for the McDowells' medical expenses unless and until the McDowells signed the "trust agreement." When the McDowells' medical providers demanded payment, the McDowells signed the trust agreement so that their medical bills would be paid. However, the McDowells signed the document under protest. Affidavit of Mr. McDowell, p. 2., in **McDowell II**, USDC Case No. 02-6110, CR:16. Respondent Providence provided no consideration in return for execution of the trust agreement. Magistrate Judge Jelderks in **McDowell I** held that the trust agreement lacked consideration. **McDowell I** Opinion, App:E-3-4, footnote 1. Respondent Providence did not assign error in the ninth circuit to the district court's finding.

In respondent's brief in opposition, page six, respondent asserts that "under the federal common law of equity, respondent was entitled to specific performance of those contracts as other 'appropriate equitable relief' under 29 USC § 1132(a)(3)." Respondent Providence is mistaken. Federal courts should not create a common law remedy when ERISA does not authorize one. See, e.g., *Sanson v. General Motors Corp.*, 966 F2d 618, 621-622 (11th Cir. 1992), *reh den*, 974 F2d 1350, *cert den*, 507 US 984 (action by retiree against former employer in which retiree contended he was defrauded of pension benefits). Relying on *Pilot Life Ins. Co. v. Dedeaux*, 418 US 41, 107 S Ct 1549, 95 L Ed 2d 39 (1987), the *Sanson* court noted that this Court had previously considered and rejected such an extension of remedies. 966 F2d at 622.

REPLY TO PROVIDENCE'S ASSERTED REASONS FOR DENYING THE McDOWELLS' PETITION

On page eight, respondent Providence asserts that this Court "acknowledged that other remedies outside ERISA might be available to the fiduciary, and expressly left open the issue of whether a direct action by petitioners against respondents asserting state-law claims such as breach of contract would [be] preempted by ERISA," citing page 220 of this Court's opinion in *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 US 204, 122 S Ct 708, 151 L Ed 2d 635 (2002). What this Court actually said in *Great-West* was:

> "We note, though it is not necessary to our decision, that there may have been other means for petitioners to obtain the essentially legal relief that they seek. We express no opinion as to whether the petitioners could have intervened in the state-court tort action brought by respondents or whether a direct action by petitioners against respondents asserting state-law claims such as breach of contract would have been preempted by ERISA." 534 US at 220.

As petitioners McDowell have pointed out repeatedly, Providence had adequate state law remedies, but chose not to pursue them. Respondent Providence could have pursued a subrogation action against the third-party tortfeasors (§ 11.4 of the plan contemplates such a subrogation action; see, Exhibit 2 to Complaint in **McDowell I**, USDC Case No. 01-1704, CR:1, p. 43), or sought reimbursement directly from the tortfeasors' liability insurance carrier, or intervened in the McDowells' Washington state action against the tortfeasors, but chose not to pursue any of those options. None of those alternatives would have

involved an action between an ERISA fiduciary and an ERISA beneficiary or participant. *Great-West* did not preclude such actions.

REPLY TO PROVIDENCE'S ARGUMENT

Reply to Argument I.A.: Respondent Providence's State Law Breach of Contract Action Relates to its ERISA Plan

Respondent Providence contends that its state law claim for breach of contract does not relate to its ERISA plan, citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 US 645,115 S Ct 1671, 131 L Ed 2d 695 (1995). Petitioners have already discussed *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* See, Petition for Writ of *Certiorari* in 04-883, pp. 15-16. In addition, however, respondent, in footnote 4 on page 9, cites the definition of "employee welfare benefit plan" in 29 USC § 1002(1). Respondent contends that the definition in § 1002(1):

> " . . . makes clear that a document containing promises from an employer offering benefits to employees is, to that extent, an ERISA Plan. To the extent the document also contains other promises, such as a promise to reimburse the insurer for benefits paid from a third-party recovery, those promises are not part of the ERISA-regulated plan." Respondent's Brief in Opposition, p. 9, footnote 4.

Respondent offers no authority for such an interpretation of 29 USC § 1002(1), and counsel for petitioners has found none. Indeed, this Court's discussion in *Pegram v. Herdrich,* 530 US 211, 147 L Ed 2d 164, 120 S Ct 2143 (2000) would indicate otherwise. An ERISA plan does not merely include promises by the fiduciary to pay benefits, but also

for example includes promises by the participant (or his employer) to pay premiums, includes the rules governing collection of premiums, includes the definition of benefits payable, includes the requirements for submission by the participant or beneficiary of claims, and includes the procedures for resolution of disagreements over benefits payable. 530 US at 222-223. In other words, an ERISA plan seeks to impose obligations on both fiduciaries and participants (or beneficiaries).

At pages 11 and 12 of its brief in opposition, respondent Providence quotes the panel's stated reason for holding that Providence's state law claim did not relate to the plan:

> "Adjudication of its claim does not require interpreting the plan or dictate any sort of distribution of benefits." *Providence Health Plan v. McDowell,* 385 F3d 1168, 1172 (9th Cir. 2004).

Respondent again cites the same language in its brief in opposition at page 19. With all due respect to the panel, petitioners strongly disagree. The reimbursement provision is contained in § 11 of the plan. See, Exhibit 2 to Complaint in **McDowell I,** USDC Case No. 01-1784, CR:1, pp. 42-43. In the quoted language, the panel first asserts that adjudication of Providence's claim will not require "interpretation" of the plan. "Interpret" means to explain or construe. See, *Webster's Unabridged Dictionary,* 2d Ed (1983). Certainly, if respondent's complaint is remanded to state court, the state court judge will have to "interpret" and apply the reimbursement provision (§ 11.2) of the plan. For example, what are the "proceeds of any settlement" to which Providence contends the reimbursement provision applies? For another example, what is a "proportionate share of reasonable attorney's fees" which should be deducted from any reimbursement? These phrases are

part of the language of the reimbursement provision (§ 11.2).

In the same quoted language, the panel next asserts that adjudication of the McDowells' claim does not dictate a distribution of benefits. But, Mr. McDowell's employer paid premiums to respondent Providence in return for which Providence promised to pay the McDowells' medical expenses. As a result of application of the reimbursement provision of the plan, Providence will recover the benefits paid (less their share of attorney's fees). Thus, by application of § 11.2, Providence avoids paying benefits.

Pursuant to another subsection of § 11, specifically § 11.5, respondent Providence contended it had the right to require the McDowells to execute the "trust agreement" requiring the McDowells to reimburse respondent Providence from the McDowells' recovery from the tortfeasors. See, Exhibit 2 to Complaint in **McDowell I**, USDC Case No. 01-1784, CR:1, pp. 47-48. Does counsel for Providence contend that § 11.5 is also not part of the plan?

In footnote 6, pages 12-13 of respondent Providence's brief in opposition, respondent reveals its essential position in this case. Respondent states:

> Petitioners claim that respondent's state law breach of contract action is an "alternative enforcement mechanism" and is thus preempted. [Citation omitted] This Court's decision in *Blue Cross & Blue Shield* makes it clear that ERISA preempts alternative methods by which *beneficiaries* can enforce their rights under an ERISA plan. 514 US at 658. A *fiduciary's* claim for breach of contract to enforce a reimbursement provision is not an "alternative enforcement mechanism" since, under this Court's decision in *Great-West*, ERISA does not provide an

> enforcement mechanism. (Respondent's emphasis) Respondent's Brief in Opposition, pp. 12-13, footnote 6.

Respondent Providence thus contends that the prohibition against "alternative enforcement mechanisms" is a one-way street. Respondent apparently believes that the prohibition prevents a beneficiary or participant from suing a fiduciary for state law claims, such as a claim for bad faith, but does not prevent a fiduciary from suing a beneficiary or participant for state law claims. No decision of this Court so holds, and there is no indication that this court intended the prohibition to be so one-sided.

At footnote 7, page 13 of respondent's brief in opposition, respondent Providence asserts that in the trial court, and on appeal, respondent argued that its state law claim was saved from preemption by 29 USC § 1144(b)(2)(A) because respondent's state law claim was a "state law" regulating insurance. Respondent misleads this Court. Respondent Providence argued **for the first time** in the ninth circuit, citing and relying on ORS 742.538, that its state law claim was a "state law" regulating insurance. Respondent Providence did not cite ORS 742.538 or otherwise argue that statute in the trial court. Rather, respondent Providence stated in the trial court only that it was a "health care service contractor . . . under Oregon law, regulated by the Department of Consumer and Business Services under ORS chapter 750" and that Oregon statutes regulated "health plan forms." Memorandum in Support of Motion to Remand, p. 13, in **McDowell I**, 01-1704, CR:7. Thus, since respondent Providence did not raise the argument based on ORS 742.538 in the trial court, the issue was not preserved on appeal. *Doi v. Halekulani Corp.*, 276 F3d 1131, 1140 (9th Cir. 2002); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F3d 1101, 1108

(9th Cir. 2001); *Heller v. Doe*, 509 US 312, 318-319, 125 L Ed 2d 257, 113 S Ct 2637 (1993).

Reply to Argument II: The Panel's Decision Conflicts with Decisions of the Federal Circuits

At pages 19-20, respondent Providence contends that a "second" category of cases relied upon by the McDowells involved federal claims for reimbursement of benefits paid. Respondent then states: "In each case, the court [of appeal] found that such claims are not properly brought in federal court under ERISA." Respondent Providence's characterization of these cases is not entirely accurate. Some of these cases are described below:

(1) *Qualchoice, Inc. v. Rowland*, 367 F 3d 638 (6th Cir. 2004): Respondent contends that in *Qualchoice*, the fiduciary brought a "federal claim for reimbursement of benefits paid." In fact, the fiduciary attempted to make a claim under "federal common law," which the fiduciary characterized as a claim for "equitable restitution." The sixth circuit held that 29 USC § 1132(a)(1) was the **exclusive** basis for federal subject matter jurisdiction for civil enforcement proceedings. 367 F3d at 643.

(2) *Cooperative Benefit Adm. v. Ogden*, 367 F3d 323 (5th Cir. 2004): The fiduciary made a federal common law claim on a theory of unjust enrichment. The fifth circuit rejected the claim, holding the fiduciary's complaint failed to state a claim.

(3) *Community Health Plan v. Mosser*, 347 F3d 619 (6th Cir. 2003): The fiduciary brought a federal common law claim for specific performance and restitution. The sixth circuit dismissed the complaint.

(4) *Honolulu Joint App. & Train. Committee v. Foster*, 332 F3d 1234 (9th Cir. 2003): The administrator

originally brought suit in state court, but the action was dismissed as preempted. The administrator then brought suit in federal court, and sought "restitution." The ninth circuit held the administrator's claim was not "appropriate equitable relief."

(5) *Primax Recoveries v. Sevilla,* 324 F3d 544 (7th Cir. 2003): The employer's assignee brought an action for declaratory relief seeking a ruling "that [the employer's] plan overruled the state [Illinois] common fund doctrine." The assignee's complaint was dismissed.

(6) *Bauhaus USA v. Copeland,* 292 F3d 439 (5th Cir. 2002): The administrator brought a declaratory judgment action seeking a declaration that ERISA preempted the state law which required court approval of the assignment of a minor's right to insurance proceeds. The complaint was dismissed.

(7) *Pacificare v. Martin,* 34 F3d 834 (9th Cir. 1994): The ninth circuit held there is no federal common law claim for reimbursement by a fiduciary.

As petitioner has previously pointed out, ERISA precludes any common law claim, federal or state. See, *Sanson v. General Motors Corp,* 966 F2d 618, 621- 622 (11th Cir. 1992), *reh den*, 974 F2d 1350, *cert den*, 507 US 984.

CONCLUSION

This court should grant petitioner McDowells' petition, vacate the decision of the ninth circuit in **McDowell I**, and affirm the decision of the district court.

Respectfully submitted,

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